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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections of	)	MM Docket 92-266
the Cable Television Consumer	)	
Protection and Competition Act	)	
of 1992	)	
Rate Regulation	)	

PETITION FOR RECONSIDERATION

On behalf of Black Entertainment Television, Inc. ("BET"), we hereby submit this Petition for Reconsideration of the Commission's Report and Order and Further Notice of Proposed Rulemaking ("Report and Order") in the captioned proceeding, released May 3, 1993 (FCC 93-177). Specifically, BET urges the Commission to reconsider the limitation on pass-throughs permitted for programming services affiliated with cable television multiple system operators ("MSO's") set forth in paragraph 252 of the Report and Order.

In the Report and Order, the Commission determined that "pass-throughs of increases in programming costs attributable to the program services affiliated with such systems will be capped at the lesser of the annual incremental percentage increase in such costs or the GNP-PI." Paragraph 252. The Commission also adopted the broad definition of "affiliated" programmer set forth in the Commission's First Report and Order in MM Docket No. 92-265. Namely, any MSO ownership interest of five percent or greater, whether active or passive, would be considered

attributable, without regard to the single majority shareholder rule applicable in the broadcast context.

The restriction on pass-throughs for programming costs attributable to so-called "affiliated" programmers should be removed or modified for several reasons. First, the Commission gave no notice that it was considering adoption of such a restriction and thus, BET had no opportunity to comment on the proposal prior to its adoption, in violation of the Administrative Procedure Act. Secondly, the restriction is unnecessary since affiliated programmers are already prohibited from price discrimination by Section 628 of the 1992 Cable Act, 47 U.S.C. § 548, and the Commission's regulations promulgated thereunder. Since the stated purpose of the Commission's pass-through restriction is to prevent price increases to cable subscribers resulting from artificial programming costs attributed to affiliated cable programmers, Section 628 of the Cable Act renders that fear unfounded. Third, the pass-through restriction works a particular hardship on BET, which is likely to be dropped if cable operators cannot pass through BET's increased programming costs to their subscribers. Since BET is a minority owned cable pr-

BACKGROUND

BET is a qualified minority programming source which is over 50% minority owned under Section 9(c) of the Cable Act, 47 U.S.C. § 532. As such, BET "promote[s] competition in the delivery of diverse sources of video programming . . .," id., and "increas[es] competition and diversity in the multichannel video programming market . . . ." 47 U.S.C. § 548(a). In other words, the minority programming provided by BET furthers the express goals of the Cable Act by providing a diversity of programming and viewpoints not presented by most other cable programmers. Because of its niche programming, however, BET faces special problems in gaining access to both cable and other multichannel program distributors not faced by most mainstream cable programmers. While two cable MSO's hold a minority interest in BET, a portion of BET's stock is publicly traded, and over 50% of its voting stock is minority owned. Under the circumstances, the Commission's definition of an affiliated cable programmer is unduly broad and creates a disincentive for cable operators to carry or invest in BET.

Although the Commission's restrictions on the ability of cable operators to pass through the programming costs of so-called "affiliated" programmers are intended to prevent cable subscriber rate increases from including artificially high programming costs, the actual effect of those restrictions will be to give cable operators an incentive to drop BET as a service

they cannot afford. This could be particularly damaging for a niche service such as BET which has more difficulty gaining access to cable and would disserve the stated purpose of the Cable Act to promote diversity of programming.

I. The Commission's Restrictions on Pass-Throughs of Programming Costs from Affiliated Programmers Violates the APA

Nowhere in the Commission's Notice of Proposed Rulemaking in this proceeding did the Commission mention that it was considering a restriction on the pass-through of programming costs attributable to so-called "affiliated" programmers. Had such a proposal been set forth, BET and others similarly affected would have had an opportunity to present their views and arguments against such a proposal. The opportunity for notice and comment in an administrative agency rulemaking proceeding violates one of the basic tenets of the Administrative Procedure Act, 5 U.S.C. § 553.

Section 4(a)(3) of the Administrative Procedure Act, 5 U.S.C. § 553(b)(3) (1977), states:

> General notice of proposed rulemaking shall be published in the Federal Register . . . . The notice shall include --
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> * * *
>
> (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

The APA further provides that an agency must allow interested parties "an opportunity to participate in the rule making" through submission of comment on the proposed rules. 5 U.S.C. § 553(c).

These notice and comment provisions encourage public involvement in the process of formulating substantive rules that affect interested parties and various industries. Their purpose "is both (1) to allow the agency to benefit from the experience and input of the parties who file comments . . . and (2) to see to it that the agency maintains a flexible and open-minded attitude towards its own rules." National Tour Brokers Ass'n v. United States, 591 F.2d 896, 902 (D.C. Cir. 1978); accord Chocolate Manufacturers Ass'n v. Block, 755 F.2d 1098, 1103 (4th Cir. 1985). Provisions for comments after the promulgation of rules do not satisfy the APA because § 553 is designed to ensure that affected parties have an opportunity to influence rulemaking at an early stage, when the agency is more likely to give alternative ideas serious consideration. New Jersey v. EPA, 626 F.2d 1038, 1049 (D.C. Cir. 1980); Sharon Steel Corp. v. EPA, 597 F.2d 377, 380 (3d Cir. 1979) ("[P]rior notice and comment allows effective participation in the rulemaking process while the decisionmaker is still receptive to information and argument. After the final rule is issued, the petitioner must come hat-in-hand and run the risk that the decisionmaker is likely to resist change."). A court must set aside any final agency rulemaking if

it finds that the action violated the APA. See 5 U.S.C. § 706(2)(A)(D).

> Agency notice must describe the range of alternatives being considered with reasonable specificity. Otherwise, interested parties will not know what to comment on, and notice will not lead to better-informed agency decisionmaking.

Small Refiner Lead Phasedown Task Force v. EPA, 705 F.2d 506 (D.C. Cir. 1983). Thus, when the notice gives no specific indication of the agency's eventual final rule, the notice does not serve the APA's policies and is inadequate. Accord Home Box Office, Inc. v. FCC, 567 F.2d 9, 36 (D.C. Cir.), cert. denied 434 U.S. 829 (1977) (FCC "had an obligation to make its views known to the public in a concrete and focused form so as to make criticism or formulation of alternatives possible.") Accord, United Church Board for World Ministries v. SEC, 617 F.Supp. 837, 840 (D.D.C. 1985) ("[a] general request for comments is not adequate notice of a proposed rule change. Interested parties are unable to participate meaningfully in the rulemaking process without some notice of the direction in which the agency proposes to go.")

Thus, although a general request for comments may serve as a springboard for a subsequent notice containing specific proposed rules and/or variations, the general notice cannot lead directly to promulgation of a final rule absent opportunity for public comment. An agency that jumps from a general notice to a

specific final rule eliminates public participation in the rulemaking and undermines the APA. The pass-through restrictions imposed on the programming costs of affiliated programmers is not a logical outgrowth of the NPRM in this proceeding, since there was no indication that the Commission was even considering such a restriction.

To the contrary, the Commission admits in paragraph 251 of the Report and Order that, "[t]he record shows that programming costs have increased at a rate far exceeding the rate of inflation," and that capping rate increases at GNP-PI "might inadvertently harm the continued ability of programmers to develop and produce programming." In other words, the record developed in this proceeding supports the antithesis of the Com-

notice of its intent to impose such a restriction and since the record developed in this proceeding supports the opposite conclusion from that reached by the Commission regarding the possibility for abuse by affiliated programmers, the rule must be stricken for failure to comply with basic APA notice and comment requirements.

II. The Pass-Through Restrictions Relating to Programming Costs of "Affiliated" Programmers Are Unnecessary in View of the Inability of Such Programmers to Price Discriminate

In restricting the pass-through of programming costs from affiliated programmers, the Commission stated that it was "concerned about abuses that might occur if we permit vertically integrated cable operators to engage in unlimited pass-throughs of programming costs to their subscribers." Report and Order, ¶252. While the Commission did not elaborate on that concern, the only conceivable explanation is that affiliated programmers might artificially increase programming costs to their "affiliated" cable operators so as to allow for otherwise prohibited subscriber rate increases that would then flow back to the MSO "owners" of the affiliated programmer. While this rationale has a superficially logical appeal, the statutory restrictions on prices charged to cable operators by affiliated programmers renders the Commission's rationale erroneous.

Section 628 of the Cable Act specifically prohibits affiliated programmers from discriminating "in the prices, terms,

and conditions of sale or delivery . . . among or between cable systems, cable operators, or other multichannel video programming distributors . . . ." 47 U.S.C. § 548(c)(2)(B). Thus, affiliated programmers cannot increase prices to affiliated cable operators without similar increases to all cable operators and other multichannel program distributors. Although there are some narrow exceptions to the rule, price differentials generally would have to be justified by actual differences in cost or economies of scale. Neither the statute nor the rules promulgated by the Commission thereunder would permit cost differentials based solely on whether the cable operator is owned by an affiliated

exceeding the rate of inflation," and capping rate increases at GNP-PI "might inadvertently harm the continued ability of programmers to develop and produce programming." Report and Order, ¶251. This is exactly the situation in which the Commission has placed BET. If BET cannot recover its programming costs, it will not be able to develop and produce minority programming which would otherwise serve the public interest in its diversity. Indeed, Section 9(c) of the Cable Act specifically allows cable operators to carry qualified minority programming such as BET to satisfy up to 33% of a cable operator's commercial leased access requirements, "whether or not such source is affiliated with the cable operator." In restricting the programming costs BET can recover, the Commission is thus disserving the explicitly stated purpose of the statute to further diversity of programming through minority programming. There is no statutory authority, however, for the Commission's unduly harsh restriction on pass-through of programming costs to cable operators by so-called "affiliated" programmers.

Attached to this Petition as Exhibits I and II are letters to the Commission from the U.S. Senate Committee on Commerce, Science and Transportation, and from Senator John D. Rockefeller IV, questioning the necessity for a rule restricting pass-throughs of programming costs of "affiliated" programmers such as BET when such programmers are statutorily obligated to have nondiscriminatory price increases. As Senators Burns and

Hollings note on behalf of the Senate Commerce Committee, this rule "may handicap the ability of the vertically integrated networks to make quality improvements on the same basis as networks that are not integrated." Ex. I.

III. The Commission's Pass-Through Restrictions Work a Particular Hardship on BET

For the reasons previously stated, the Commission's pass-through restrictions on programming costs from so-called "affiliated" programmers work a particular hardship on BET since, as a minority programmer, BET has a difficult time gaining access on cable systems even without such restrictions. By contrast, unaffiliated programmers such as ESPN and USA Network have no such restrictions imposed upon their programming costs, even though their market power is undeniably greater than BET's, based merely on the number of cable systems and subscribers receiving those services. A fair reading of the 1992 Cable Act leads to the inevitable conclusion that Congress could not have intended the Commission to enact a rule that would work a particular hardship on a minority programmer such as BET vis-a-vis other mainstream cable programmers. See, e.g., Section 9(c) of the Act, allowing cable operators to carry qualified minority programming in partial satisfaction of leased access requirements.

Accordingly, if the Commission determines to leave its affiliated programmer pass-through restrictions intact, BET would urge the Commission to adopt an exception for a "qualified

minority programming source" as defined in Section 9(c)(i)(2) of the Act. Such an exception would help harmonize the Commission's pass-through restrictions with the stated Congressional purpose of furthering minority programming.

CONCLUSION

For the foregoing reasons, BET urges the Commission to reconsider its adoption of the restriction on pass-throughs of programming cost increases of so-called "affiliated" programmers or, alternatively, to allow an exception for programming originating from a "qualified minority programming source" consistent with Section 628 of the Act.

Respectfully submitted,

BLACK ENTERTAINMENT TELEVISION, INC.

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June 21, 1993

EXHIBIT I

United States Senate

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

WASHINGTON, DC 20510-6125

May 27, 1993

The Honorable James H. Quello
Chairman
Federal Communications Commission
1919 M Street, N.W.
Room 802
Washington, D.C. 20554

Dear Mr. Chairman:

We are writing to request clarification of Section 76.922 of the Commission's new cable rate regulation rules. The rules state that generally cable systems will be allowed to recover [illegible] cost increases that exceed the rate of inflation, but

JOHN D. ROCKEFELLER IV
WEST VIRGINIA

EXHIBIT II

United States Senate

WASHINGTON, DC 20510-4802

May 28, 1993

Dear Mr. Stewart,

I am writing with a question regarding Section 76.922 of the Commission's new cable rate regulation rules. The rules state that generally cable systems will be allowed to recover programming cost increases that exceed the rate of inflation, but that in the case of "affiliated programmers", cost increases above inflation will not be recoverable. A definition of "affiliated programmers" for purposes of this section was apparently omitted from the rules.

My question is whether the provision was intended to apply to the nondiscriminatory price increases of nationally distributed program services that are vertically integrated, such as CNN, TNT, Discover, the Family Channel and BET.

I would appreciate your attention to this matter.

Sincerely,

John D. Rockefeller IV

The Honorable Roy J. Stewart
Chief, Mass Media Bureau
Federal Communications Commission
1919 M Street, N. W.
Washington, D. C. 20554